No. 80-1505

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RANCHO LA COSTA,

Petitioner,

vs.

COUNTY OF SAN DIEGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, is reported at 111 Cal.App.3d 54. It is set out in full in the appendix to the petition herein.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1257(3). The jurisdictional facts are correctly stated by petitioner in its jurisdictional statement.

QUESTION PRESENTED

Does long-range planning for future public regional parks by local government constitute a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

The petition herein seeks review of the opinion of the California Court of Appeal, Fourth Appellate District, Division One, ordering a judgment of dismissal of petitioner's action in inverse condemnation thereby reversing a Superior Court judgment which found liability against the County of San Diego (hereinafter "County"). The Court of Appeal held that there was not a taking which amounted to inverse condemnation. The statement of the case in the petition is only partially correct, since many assertions of fact therein are not supported by any evidence and were rejected by the Court of Appeal below.

Respondent will summarize the official actions taken by the County with respect to petitioner's property, the type of actions which the County did not take, and finally will clarify the important facts which have been misstated by petitioner.

1. OFFICIAL ACTIONS OF THE COUNTY

The evidence shows that the only official actions taken by the County, acting through its Board of Supervisors, with related to Rancho La Costa's (hereinafter "R.L.C.") property, were the following:

(a) The adoption of the County's General Plan 1990, in 1967, which designated potential regional park sites throughout the County and designated one such site with undetermined boundaries in and around Batiquitos Lagoon with a statement that a potential park at Batiquitos Lagoon should be developed

in cooperation with both private owners and public agencies. (Exh. 1.)[1]

(b) The acceptance by the Board of Supervisors, on April 19, 1972, of a Regional Park Implementation Study (RPIS) which was an initial study by private consultants concerning potential regional parks designated in the General Plan 1990, and represented preliminary planning only as more precise planning, fixing specific boundaries and determination of funding sources had to be accomplished prior to any future acquisition and development of properties for the potential regional parks. (Exh. 6, R.T. 564-624.)

The other official action advanced by petitioner which related to its property was an action by the Local Agency Formation Commission (LAFCO), denying annexation of a portion of RLC's property to the City of Carlsbad on December 4, 1972. Such action was not an action of the County since LAFCO is an independent local agency.

2. ACTIONS NOT TAKEN BY THE COUNTY

It is instructive in this case to consider the actions the County *has not* taken with regard to RLC's property:

(a) There has been no down-zoning or other restrictions on the existing use of the property. The zoning on the property has not changed and is a type of zoning which RLC requested and agreed with (R.T. 173).

(b) There has been no application by RLC for any rezone, special use permit, conditional use permit, tentative map, final map, building permit, or any other permit applicable to its property at any time in this case, thus there has been no denial by the County of any applications filed by RLC (F.F.12; C.T. 171).

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[1]Respondent will use the same abbreviated references as petitioner.

(c) There has been no announcement, formal or informal, by the County of an intention to condemn RLC's property.

3. SUMMARY OF THE EVIDENCE

(a) The Property and its Ownership.

RLC's property lies on the California coast and consists in part of a coastal lagoon known as Batiquitos Lagoon, which is recognized as an ecologically sensitive area, an important wildlife habitat, and a potential marine life habitat. The portions of Exhibit 55 quoted by petitioner wherein the lagoon is described was not related to any potential acquisition of property for a regional park, but was an interdepartmental memorandum concerning the possible securing of grant funds for a resource conservation project to stop erosion and siltation of coastal lagoons in the County. The memo was written in 1976.

(b) RLC's Use of the Subject Property and its Efforts to Devote it to a Reasonable, Beneficial and Economic Use.

RLC's property was zoned A-1(8), an agricultural zone which allowed one dwelling unit per eight acres, and a zoning which was requested by RLC (R.T. 119, 120). RLC never requested a change of the zone and voluntarily elected to utilize only a small portion of its total property for farming purposes. It did not develop the property consistent with the zoning or the General Plan. The General Plan at all times allowed .75 to 3.3 dwelling units per acre (Exh. B), and RLC could have applied to develop the property consistent with the General Plan and request a rezone that would be consistent with the General Plan. RLC never filed an application to devote its property to a use more beneficial than farming, even though it could have. The majority of RLC's property went vacant and undeveloped even

though the zoning and General Plan allowed for more intense use.

RLC's comparison of income from farming and taxes paid is misleading in that the taxes shown are for its total ownership of 1980 acres; whereas, the farming income was only from 265 acres of its total ownership.

RLC sold a portion of its property (830 acres) to a neighboring development (La Costa Resort and Country Club) and testified that it could have sold the remaining property in separate parcels and that there were plenty of buyers for the property (R.T. 252-254).

(c) The Proposed Batiquitos Lagoon Regional Park.

There is no evidence that the County's Board of Supervisors informally adopted a policy that its planning department would not accept any applications for rezoning or special use permits from RLC. RLC's reference to the record does not support its statement of the evidence since it refers to a document marked as an Exhibit which was rejected by the Court as evidence (R.T. 26; C.T. 554) and refers to an assertion by RLC's attorney which is not evidence (R.T. 205). The March 1971 denial of a rezone request concerns commercial property far removed from the subject property. It was a request for a special use permit and a rezone for a trailer park from an existing commercial zone. RLC, as well as all property owners, have a right to submit an application upon payment of the prescribed fees, and RLC has never identified a County official, a specific date, or any other evidence to support its assertion of such an informal policy to preclude applications from being filed.

There is no evidence that RLC could not have developed its property without its annexation to the City of Carlsbad, and the

Court of Appeal rejected such a contention. RLC refers to the testimony of the appraisers in the valuation trial concerning highest and best use, however, the appraisers highest and best use was for a very high density residential development. The appraisers did not conclude that annexation to the City of Carlsbad was necessary for any development, but that it may be necessary for such highest and best use or high density development. (Val. R.T. I 315-319, II 199). The evidence shows that other less dense development could have occurred without annexation and that prior to 1970, RLC could have connected to the sewer in a County sanitation district, and after 1970 could have negotiated an agreement for joint use of the City of Carlsbad's facilities (R.T. 347-349). Furthermore, a neighboring development, the Rancho La Costa Country Club, did develop a high density project without annexation (R.T. 105). The proposed density for RLC's property on its master plan was 45,126 population and such a highest and best use would probably not even be accepted by the City of Carlsbad. The letter of December 1, 1970, referred to by RLC indicates that even the City of Carlsbad objected to such a high density and large development on the city's boundaries. The letter did not state that the land could only be developed in the City (Exh. 2). Even upon annexation, the City of Carlsbad indicated that it would place the property in a holding zone for future master planning and rezoning (Exh. 16).

The evidence surrounding the Board of Supervisor's acceptance of the RPIS shows that the Board gave direction to specifically plan, acquire, and develop the various potential regional parks in the County as funding permitted (Exhs. 6 and 6A). Such precise planning, acquisition and development has never occurred, since the funding for the proposed Batiquitos Lagoon Regional Park never materialized. RLC refers to Exhibits 7 and 18 and asserts

that the County ordered the acquisition by 1978 of Batiquitos Lagoon Regional Park. The above Exhibits do not even refer to the subject property, but refer to a State-owned freeway rest stop property, which will be referred to hereinafter. RLC also refers to Exhibit 4 and misstates the contents of that document in that the City of Carlsbad recommended exactly what the General Plan 1990 recommended. The County's response was not inconsistent since the County recommended public ownership qualified with the statement that at the precise planning stage, it would be appropriate to involve private property owners to assist in the development of any park. But as noted, the precise planning stage was never reached with regard to this potential regional park since it was contingent upon future funding. In the Board's acceptance of the RPIS, it directed the initiation of precise planning which must precede acquisition and development, and the precise planning did not materialize with regard to Batiquitos Lagoon. The RPIS is properly characterized as a schematic concept study only and illustrates that it is merely the initial and early planning actions of the County (Exhs. 6 and 6A).

With regard to the actions of County officials concerning RLC's application for annexation made to LAFCO, RLC misstates the evidence. The response of the County Planning Department was to recommend denial of annexation based upon five separate reasons consitent with the considerations required of LAFCO under California law, and only one reason referred to potential park sites (Exh. 10). The response from the County Public Works Administrator included a map from the RPIS showing the initial planning and further stated that "the funds were not in sight" (Exh. 12). Exhibit 12 did not conclude that this site should be retained in the County for the County regional park system, but merely advised LAFCO of the status of planning

for the proposed park. There is no evidence that one member of the Board of Supervisors stated that the annexation should be denied so that the potential park property would be cheaper to buy. The citation to the record does not support such evidence (C.T. 657-659). Notwithstanding the lack of evidence, such a statement, if it were made, is not a statement or official action of the County or the Board of Supervisors. The actions of LAFCO on both October 2, 1972, deleting parcel C from annexation, and on December 4, 1972, deleting parcel A from annexation, were unanimous votes of LAFCO and the December 4 motion was not even made by a member of the County Board of Supervisors. The two Board of Supervisors members on the LAFCO Commission are not a majority of LAFCO which has seven Commissioners, and LAFCO is an independent entity (Exhs. 72 and 73). There is no evidence, as asserted, that Supervisor Craven of the County stated that the area within the proposed Batiquitos Lagoon Regional Park should not be annexed to the City of Carlsbad. RLC's own representative stated at the LAFCO hearing that RLC agreed with the proposed regional park and had no objection to the park (Exh. 73).

RLC's contentions that it could not sell its property because of the proposed County park is contrary to the evidence where RLC testified that the existence of a potential regional park had no effect upon potential purchasers of its property (R.T. 64, lines 22-24).

(d) The Batiquitos Lagoon Regional Park and the State-Owned Property.

The actions of the County with regard to the State's surplus property were limited to such property and did not relate to or affect RLC's property. The total evidence concerning the

County's actions in regard to the State property places its action into context in that the State was insisting that the property had a higher value based upon a highest and best use of commercial; whereas, the County was urging a lower value based upon the existing zoning and the County was attempting to inform potential purchasers of the surplus property as to what its highest and best use would be (Exhs. 7, 13, 19 and 24). The Board of Supervisors resolution (Exh. 23) was to further inform the public concerning the potential highest and best use of the surplus property and solely related to the State parcel and not to any of RLC's property.

(e) The Trial Court's Findings.

As recognized by the Court of Appeal, the trial court's findings referred to by RLC is not supported by the evidence.

LAFCO is an independent and separate legal entity and the two Board of Supervisors' members do not control LAFCO's actions whose votes to deny annexation were unanimous. The Court of Appeal correctly concluded that LAFCO's actions do not bind the County. The recommendations of the County's Planning Department and Public Works Administrator to LAFCO were required by State law since they were informing LAFCO of the status of planning in the area of the proposed annexation.

There is no evidence that the Board of Supervisors of the County, in 1972, took any official action to block the economic beneficial use of RLC's property so that it could be acquired as cheaply as possible.

There is no evidence to support the conclusion that it was impossible for RLC to develop its property to any use other than farming as it never submitted any development proposal consistent with the zoning or the general plan to the County. In

addition, RLC requested the existing zoning on the property and never asked for it to be changed. The evidence shows that the property could have been developed to a less dense usage than RLC's ultimate desires without annexation to the City of Carlsbad.

There is no evidence to support the conclusion that the property could not be developed unless it was annexed to the City of Carlsbad since, if sewer service was not available, the property could have been developed with septic systems, and the evidence shows that other services were available in the County and that a neighboring large development secured the necessary services through a bond issue without annexing to the City of Carlsbad.

There is no evidence that RLC was denied reasonable beneficial use of the subject property because of the Board of Supervisors' acceptance of the RPIS on April 19, 1972. In fact, RLC has always contended that the property was denied such use later in time, on December 4, 1972, upon the denial of annexation by LAFCO, which is inconsistent with the trial court's own findings.

There is no evidence to support the conclusion that on April 19, 1972, the County ordered acquisition of the subject property since it merely accepted a schematic study (RPIS) and ordered precise planning initiated and later acquisition and development if funds permitted.

The cumulative evidence in the case does not show a "taking" of RLC's property, but illustrates legitimate planning activities by the County. The County never arrived at a decision to acquire or condemn any of RLC's property. There has been no precise planning, or acquisition activity to date, and no such intention to proceed in those areas since the funding has never become available.

SUMMARY OF ARGUMENT

1. The decision below is consistent with the "taking" jurisprudence of this Court since there was no official governmental conduct here which resulted in a taking of private property under the Fifth Amendment.

2. The decision below does not raise a question concerning the inverse condemnation remedy in California since the decision was not based upon the vitality of such remedy, but expressly found that the facts did not constitute a "taking." This Court's decision in the San Diego Gas & Electric Company case has no effect on the decision below.

ARGUMENT

I

THE DECISION BELOW IS CONSISTENT WITH THE "TAKING" JURISPRUDENCE OF THIS COURT SINCE THERE WAS NO OFFICIAL GOVERNMENTAL CONDUCT HERE WHICH RESULTED IN A "TAKING" OF PRIVATE PROPERTY.

Petitioner has cited five important decisions of this Court wherein the "taking" issue was before the Court. A proper reading of these decisions illustrates the consistency of the decision below with the taking jurisprudence of this Court, and the decisions are contrary to petitioner's position advanced herein.

In *United States* v. *Dickinson* (1947) 331 U.S. 745, this Court held that where government brings about a taking by a continuing process of physical invasions of private property by permanent flooding and erosion, the Fifth Amendment requires compensation for such taking. In the case at bar, there has been no physical invasion or intrusion of RLC's property by the County. It should

be noted that RLC's quote from the *Dickinson* case is misleading in its incompleteness as this Court stated at page 748:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

A proper application of that test to the facts hereinbefore presented in the case at bar shows that there has been no taking by the County.

In *Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393, this Court held that when a police power regulation restricting the use of private property goes too far, it will be recognized as a taking. In that case the police power regulation was a Pennsylvania State Statute restricting the mining of coal on private property. In the case at bar, there has been no police power regulations enacted by the County, affecting RLC's property, thus the *Pennsylvania Coal* case does not support RLC's contention of a "taking." In addition, it is important to note that this Court in *Pennsylvania Coal* held, at page 416, that a "taking" will depend upon the facts, as it is a question of degree and that such cases cannot be disposed of by general propositions. This Court made the same observation in its more recent case of *Penn Central Trans. Co.* v. *New York City,* (1978) 438 U.S. 104, which will be referred to hereinafter. It is also important to note that this Court did not rule that compensation must be paid for the taking in the *Pennsylvania Coal* case, but that the State regulation must fall as it conflicted with the Fifth Amendment.

In the case of *Penn Central Trans. Co.* v. *New York City, supra,* this Court more recently expanded upon the "taking" jurisprudence under the Fifth Amendment by finding that the regulation of the City of New York did not amount to a taking,

since it did not interfere with the owner's present use of the property, it did not necessarily prohibit the highest and best use of the property, and it did not deny all uses for the property. In the case at bar, there was no governmental regulation applied to RLC's property. But by applying this Court's conclusions in the *Penn Central* case to the cumulative planning actions of the County in this case, it is clear that there is no "taking" as the County's actions did not interfere with RLC's present use of its property which was farming, the County's actions did not prohibit the highest and best use of RLC's property, and the County's actions did not deny all uses of RLC's property.

This Court, in *Penn Central* at Page 124, identified two factors of particular significance in determining whether or not governmental action amounts to a "taking." The first factor is the economic impacts of the regulation and particularly the extent to which it has interfered with distinct investment-back expectations, and the second factor is the character of the governmental action. This Court went on to further delineate the type of economic impacts and governmental actions which would *not* give rise to a "taking" as the Court observed:

> "A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
>
> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," [citation omitted] and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." (438 U.S. 104 at 124.)
>
> ". . . the submission that appellants may establish a "taking"

> simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." (438 U.S. 104 at 130.)

No action of the County in this case can be characterized as a physical invasion of RLC's property. The governmental action here involves long-range planning for future public regional parks in accordance with the County's General Plan. The California Supreme Court has held that such planning actions of government and its effect on property does not give rise to liability in inverse condemnation (*Selby Realty Co.* v. *City of San Buenaventura* [1973] 10 Cal.3d 110; *Agins* v. *City of Tiburon* [1979] 24 Cal.3d 266). This is consistent with this Court's view as expressed above in *Penn Central.*

As to the economic impact and reasonable expectations, RLC's contention is that it could not develop its property to its ultimate high and best use (very high density residential) as a result of the denial of annexation to the City of Carlsbad. The governmental action there was LAFCO and not the County, but despite that fact, this Court's holding in *Penn Central* above is that such expectation is unreasonable and the denial of the ability to exploit its property as RLC desired is untenable as a basis to establish a "taking." That such an expectation to exploit is unreasonable is further reinforced here because of the characteristics and location of RLC's property, which is part of and surrounds a coastal lagoon.

In the case of *Agins* v. *City of Tiburon,* (1980) ..... U.S. ....., 100S.Ct. 2138, 65 L.Ed.2d 106, this Court observed that appellants there were free to pursue their reasonable investment expectations by submitting a development plan to local officials. The same is true in the case at bar in that RLC was free to pursue

its reasonable investment expectations by submitting a development plan to the County and it neglected to submit such a plan to the appropriate County officials for acceptance or rejection. As this Court pointed out in *Agins,* when a property owner has not submitted a plan for development of their property as local ordinances permit, there is as yet no concrete controversy regarding the application of the local agencies' regulations (*Agins* v. *City of Tiburon, supra,* 65 L.Ed.2d 106, at 111). The same principle would apply in the case at bar since RLC did not submit a plan for the development of its property, thus there is no concrete controversy regarding the County's actions with regard to development of RLC's property. Furthermore, as this Court pointed out in *Agins,* the general impact of land use regulations does not deny the justice and fairness guaranteed by the Constitution.

Finally, RLC cites the case of *United States* v. *Causby,* (1945) 328 U.S. 256, to support its contention that the County took its property by its planning activities. RLC's reliance upon *Causby* is misplaced since that case involved a physical invasion and direct appropriation of an owner's property because of low overflights of aircraft. This Court found a taking in *Causby* because the overflights were so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the owner's land and in effect a direct appropriation of the land. No such facts are present in the case at bar.

As can be seen from the principles enunciated by this Court in the above cases, the actions of the County that are substantiated by the evidence in this case did not amount to a "taking" under the Fifth Amendment. There has been no physical invasion or direct appropriation of RLC's property by the County as in *Dickinson* and *Causby,* and there has been no police power

regulation or other restriction on the use of RLC's property enacted by the County as in *Pennsylvania Coal, Penn Central,* and *Agins.* Thus the above decisions are not authority to find a "taking" in the case at bar and the decision below is consistent with the "taking" jurisprudence enunciated by this Court in the above cases.

The County did not take any action in this case to preclude RLC from effectively and reasonably using its property and the actions of LAFCO in denying annexation of RLC's property are not actions of the County. RLC could have challenged the action of LAFCO by seeking court review of the denial annexation, but failed to do so. It is important to note that the facts in the case at bar most nearly parallel the facts in a recent Court of Appeal decision in California in *Briggs* v. *State of California* (1979) 98 Cal.App.3d 190, wherein the California courts rejected inverse condemnation liability and this Court declined to review the case (cert. denied, 100 S.Ct. 3005; 65 L.Ed.2d 1109). In that case, the State of California engaged in long-range planning activities with regard to a future state park and the independent California Coastal Commission denied a development permit for the property based upon the State's interest in acquiring the property for park purposes. In addition, the State engaged in extensive precondemnation activities which are not present in this case. The Court of Appeal rejected any liability in inverse condemnation. Thus, the facts in the *Briggs* case go much further than the case at bar, yet the court found no "taking" or liability in inverse condemnation. In the case at bar, the County never did form a firm intent to acquire any of RLC's property for the proposed Batiquitos Lagoon Regional Park, but only engaged in initial planning activity and advised other entities of the status of its planning activities. Such activity does not

even approach the type of impacts on private property that are necessary for there to be a "taking" under the Fifth Amendment to the United States Constitution.

II

THE DECISION BELOW DOES NOT RAISE A QUESTION CONCERNING THE AVAILABILITY OF THE INVERSE CONDEMNATION REMEDY IN CALIFORNIA.

RLC incorrectly asserts that the decision below raises a question concerning the continued vitality of the inverse condemnation remedy in California. The decision below, in concluding that there was no taking, did not rely upon that portion of the California Supreme Court's holding in *Agins* v. *City of Tiburon* (1979) 23 Cal.3d 266, wherein it was held that the invalidation of a zoning or planning regulation through mandamus or declaratory relief was the proper remedy rather than the damage remedy of inverse condemnation in cases where government regulatory action exceeds permissible Constitutional limits. To the contrary, the decision below is based on established California decisional law and this Court's views in *Agins*. The Court concluded that the actions of the County did not have a constitutionally impermissive effect on RLC's property and there was no taking in inverse condemnation. The Court's decision was not based on the availability or unavailability of the inverse condemnation remedy in California. Thus, the petitioner herein is requesting this Court to decide a question not properly raised by the decision below in this case.

RLC also refers to the "pending decision" of this Court in *San Diego Gas & Electric Company* v. *City of San Diego* (No. 79-678) and its effect on the petition herein. This Court has now rendered its opinion in *San Diego Gas* (decided March 24, 1981),

and that decision has no bearing on RLC's petition. In the *San Diego Gas* case, this Court declined to review the matter since there had been no final judgment in the California Courts and no final determination as to whether there was a "taking" in that case. In this case, however, there has been a final judgment that there was *no taking,* and such decision is supported by both California law and this Court's decisions.

III

CONCLUSION

Since the actions of the County in this case do not rise to a "taking" under the Fifth Amendment to the United States Constitution as enunciated by this Court, and the decision below is consistent with both California and Federal decisional law in the "taking" area, this Honorable Court should exercise its discretion to determine not to review the decision below. There is no substantial Federal issue raised by the facts in this case and the decision of the California Court herein is not contrary to Federal law. Therefore, the County of San Diego respectfully requests that the petition should be denied and the judgment of dismissal be affirmed.

DATED:

Respectfully submitted,
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IN THE
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OCTOBER TERM, 1980

NO. 80-1505

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Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this MAR 31 1981 C.R. day of April, 1981, three copies of the Respondent's Brief In Opposition to The California Court of Appeal, Fourth Appellate District, Division One were mailed, postage prepaid, to each of the following named persons:

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I further certify that all parties required to be served have been served.

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